

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**





# 77-1483

*To be argued by*  
RICHARD F. LAWLER

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**United States Court of Appeals**  
**FOR THE SECOND CIRCUIT**

Docket No. 77-1483

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UNITED STATES OF AMERICA,

—v.—

NEREIDA HERNANDEZ,  
*Defendant-Appellant.*

*Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

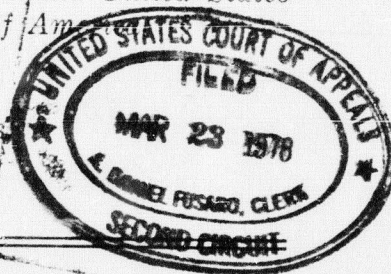
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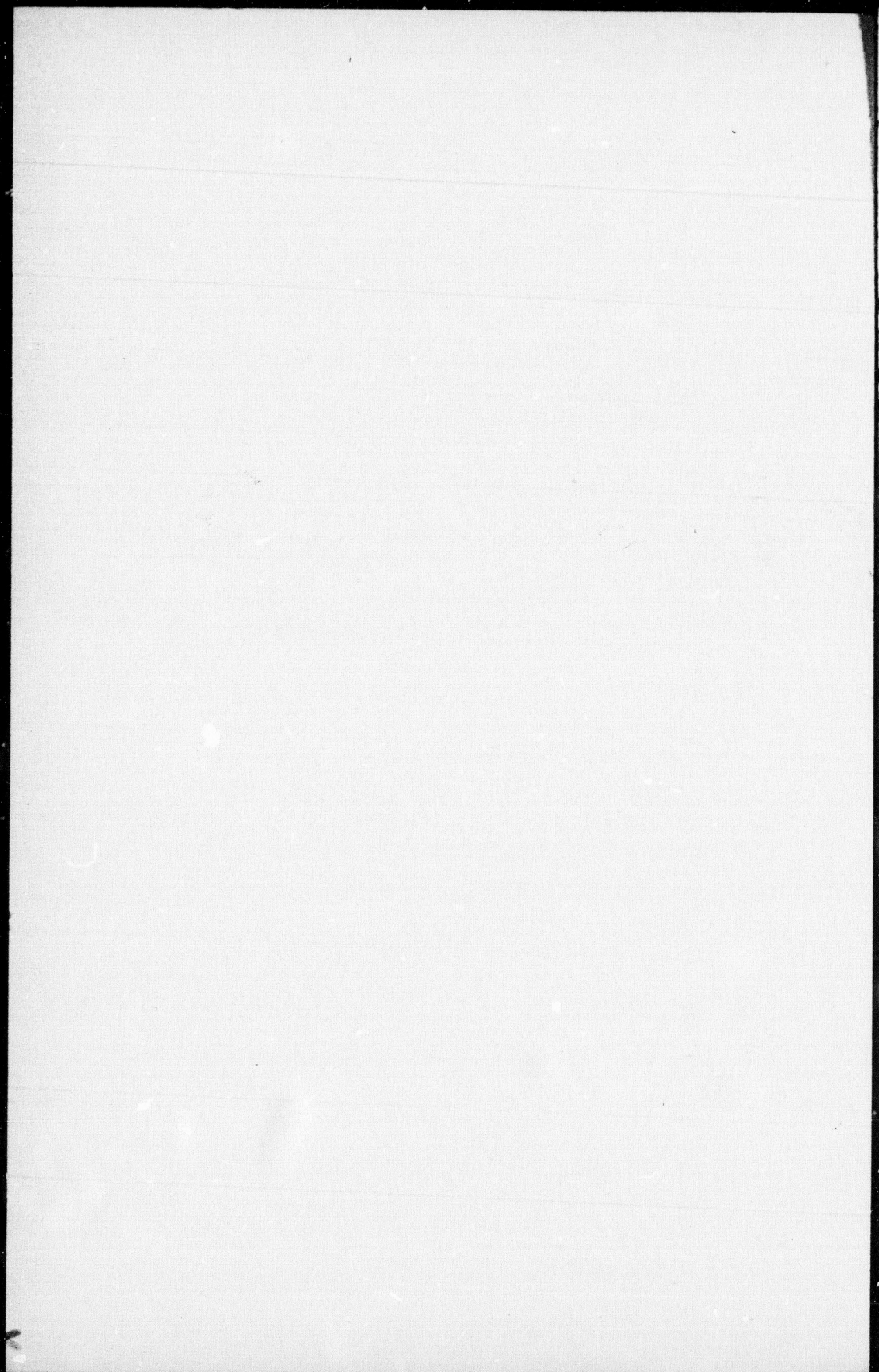
**BRIEF FOR THE UNITED STATES OF AMERICA**

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## TABLE OF CONTENTS

|                                                                                                  | PAGE |
|--------------------------------------------------------------------------------------------------|------|
| Preliminary Statement .....                                                                      | 1    |
| Statement of Facts .....                                                                         | 2    |
| A. The Government's Case .....                                                                   | 2    |
| 1. The Undercover Sales .....                                                                    | 2    |
| 2. Hernandez' Statements .....                                                                   | 4    |
| B. The Defense Case .....                                                                        | 4    |
| ARGUMENT:                                                                                        |      |
| POINT I—The District Court's Answer to the Jury's<br>Final Note Was Responsive and Accurate .... | 5    |
| POINT II—The District Court Properly Denied<br>Hernandez' Suppression Motion .....               | 9    |
| CONCLUSION .....                                                                                 | 16   |

### TABLE OF CASES

|                                                                                                             |    |
|-------------------------------------------------------------------------------------------------------------|----|
| <i>United States v. Bennett</i> , 409 F.2d 888 (2d Cir.<br>1969), cert. denied, 396 U.S. 852 (1970) .....   | 15 |
| <i>United States v. Blackwood</i> , 456 F.2d 526 (2d Cir.),<br>cert. denied, 409 U.S. 863 (1972) .....      | 16 |
| <i>United States v. Bolden</i> , 514 F.2d 1301 (D.C. Cir.<br>1975) .....                                    | 8  |
| <i>United States v. Canieso</i> , 472 F.2d 1224 (2d Cir.<br>1972) .....                                     | 13 |
| <i>United States v. DiStefano</i> , 555 F.2d 1094 (2d Cir.<br>1977) .....                                   | 7  |
| <i>United States v. Friedman</i> , 558 F.2d 1125 (2d Cir.<br>1974), cert. denied, 421 U.S. 1001 (1975) .... | 12 |



|                                                                                                                                             | PAGE |
|---------------------------------------------------------------------------------------------------------------------------------------------|------|
| <i>United States v. Gentile</i> , 525 F.2d 252 (2d Cir. 1975), <i>cert. denied</i> , 425 U.S. 903 (1976) . . . .                            | 6    |
| <i>United States v. Guanti</i> , 421 F.2d 792 (2d Cir.), <i>cert. denied</i> , 400 U.S. 832 (1970) . . . . .                                | 8    |
| <i>United States v. Guilette</i> , 547 F.2d 743 (2d Cir. 1976), <i>cert. denied</i> , 98 S. Ct. 132 (1978) . . . .                          | 7, 8 |
| <i>United States v. Hayes</i> , 553 F.2d 824 (2d Cir. 1977), <i>cert. denied</i> , 98 S. Ct. 204 (1978) . . . .                             | 6    |
| <i>United States ex rel. LaBelle v. LaVallee</i> , 517 F.2d 750 (2d Cir. 1975), <i>cert. denied</i> , 423 U.S. 1062 (1976) . . . . .        | 13   |
| <i>United States v. Mauro</i> , 507 F.2d 802 (2d Cir. 1974), <i>cert. denied</i> , 420 U.S. 99 (1975) . . . .                               | 15   |
| <i>United States v. McCarthy</i> , 473 F.2d 300 (2d Cir. 1972) . . . . .                                                                    | 6    |
| <i>United States v. Oates</i> , 560 F.2d 45 (2d Cir. 1977)                                                                                  | 12   |
| <i>United States v. Persico</i> , 349 F.2d 6 (2d Cir. 1965)                                                                                 | 8    |
| <i>United States v. Price</i> , 447 F.2d 23 (2d Cir.), <i>cert. denied</i> , 404 U.S. 912 (1971) . . . . .                                  | 6    |
| <i>United States v. Robinson</i> , 560 F.2d 507 (2d Cir. 1977) ( <i>en banc</i> ), <i>cert. denied</i> , 46 U.S.L.W. (March 1978) . . . . . | 8    |
| <i>United States v. Rodriguez</i> , 545 F.2d 829 (2d Cir. 1976), <i>cert. denied</i> , 46 U.S.L.W. 3215 (October 4, 1977) . . . . .         | 9    |
| <i>United States v. Tortorello</i> , 480 F.2d 764 (2d Cir.), <i>cert. denied</i> , 414 U.S. 866 (1973) . . . . .                            | 15   |
| <i>United States v. Yanagita</i> , 552 F.2d 940 (2d Cir. 1977) . . . . .                                                                    | 15   |
| <br><i>Other Authorities:</i>                                                                                                               |      |
| Federal Rules of Criminal Procedure, Rule 12(f) . .                                                                                         | 14   |

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UNITED STATES OF AMERICA,

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—v.—

NEREIDA HERNANDEZ,

*Defendant-Appellant.*

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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**Preliminary Statement**

Nereida Hernandez appeals from a judgment of conviction entered on November 11, 1977 in the United States District Court for the Southern District of New York following a four day trial before the Honorable Lee P. Gagliardi and a jury.

Indictment S 77 Cr. 462, filed on July 22, 1977 in Count One charged Nereida Hernandez and six others—Carlos Dellafuente, Rafael Pagan, Edemiro Torres, Juan Cruz, Radimus DeJesus and Carlos Rodriguez—with conspiracy to distribute and possess with intent to distribute heroin and cocaine in violation of Title 21, United States Code, Section 846. Counts Two through Nine charged various defendants other than Nereida Hernandez with substantive violations of the narcotics laws and Count Ten charged Dellafuente with carrying a firearm during the commission of a felony.

Trial of Hernandez and Cruz began on August 23, 1977 following a denial of Hernandez' suppression motion.\* All of the other defendants pleaded guilty prior to trial.\*\* On August 25 the jury returned a verdict of guilty as to Cruz and on August 26 Hernandez was found guilty.

On November 11, 1977 Hernandez was sentenced as a Young Adult Offender pursuant to Title 18, United States Code, Sections 4216 and 5010(a). Imposition of sentence was suspended, and she was placed on probation for 3 years. Participation in a residential drug treatment program was made a condition of her probation.

### **Statement of Facts**

#### **A. The Government's Case**

##### **1. The Undercover Sales**

Through the testimony of four police officers the Government established Hernandez' participation in a conspiracy to distribute heroin.

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\* Juan Cruz was convicted after trial on both of the counts in which he was named as a defendant. He failed to appear for sentencing and is currently a fugitive. A bench warrant was issued on October 18, 1977.

\*\* Torres pleaded guilty on August 8, 1977 to two substantive counts and was sentenced to 5 years imprisonment and 6 years special parole on each count, the sentences to be served concurrently. Rodriguez pleaded guilty to a substantive count on August 19, 1977 and was sentenced to 2 years imprisonment and 6 years special parole; on August 22, 1977 Pagan pleaded guilty to a substantive count and was sentenced to 4 years imprisonment and 6 years special parole; Dellafuente also pleaded guilty on August 22, 1977 to conspiracy and was sentenced to 5 years imprisonment and 6 years special parole; De Jesus pleaded guilty to conspiracy on August 23, 1977 and was sentenced to 33 months imprisonment and 6 years special parole.



On April 7, 1977 Detective Jose Guzman purchased approximately one ounce of heroin for \$1200. The sale took place in apartment 3H at 640 East 139th St., Bronx, New York. Present in the apartment and participating in the sale were defendants Torres, DeJesus, Rodriguez and Cruz. The heroin was taken from a larger amount of the white powder which was piled on a table in the living room along with a strainer, scale and small plastic bags. In addition there was a box of small plastic bags already filled with white powder by the table. (Tr. 65-67). Hernandez entered the apartment while the transaction was taking place and remained in the apartment during the sale. (Tr. 70-71).<sup>\*</sup> Prior to leaving Detective Guzman discussed future sales of heroin and received two small packets of cocaine. (Tr. 73).

On April 14, 1977 Detective Guzman returned to the apartment with Police Officer Julio Mercado and they purchased approximately two ounces of heroin for \$2,000 from Torres. (Tr. 91).

On May 24, 1977 Detective Guzman and Police Officer Mercado met with Torres to receive a sample of heroin and to begin discussions for a purchase of a larger quantity of heroin. (Tr. 109, 175). At the time of these discussions Hernandez came into the room and in response to the undercover officers expressing fear of detection stated that they had nothing to worry about, she knew exactly what was happening and if anyone asked she would say they were insurance collectors. Torres with Hernandez present affirmed this by describing Hernandez as his "right hand man." (Tr. 109).

In the early morning hours of June 11, 1977 at 1246 Westchester Ave., Bronx, New York, Torres, Pagan and

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<sup>\*</sup> "Tr." refers to pages of the trial transcript; "Supp. Tr." refers to pages of the transcript of the suppression hearing; and "GX" refers to Government Exhibits received in evidence.

Dellafuente produced approximately 3¾ pounds of heroin and were arrested while arranging to sell it to the undercover police officers for \$75,000.

## **2. Hernandez' Statements**

On June 15, 1977 Hernandez was arrested by Detective Ronald Stanley. After being advised of her Miranda rights she voluntarily turned over a small quantity of cocaine on her person (GX 13) and later admitted that on June 11, 1977 she had been waiting in a nearby bar for Torres to complete the heroin sale and that he had promised to buy her an automobile after the deal was completed. (Tr. 203). She stated that she had assisted Torres in bagging, cutting and selling heroin from the apartment at 640 East 139th Street. (Tr. 202).

## **B. The Defense Case**

Though Hernandez called Detective Joseph Scamardella, objections to nearly all questions put to him were sustained by the District Court. (Tr. 279-283). Hernandez took the stand and testified that she lived with Torres because he supported her drug habit, that she bagged heroin for her own use only and that she stopped doing so on April 8 when she went into a detoxification program. (Tr. 297). She also said that she had just glanced at but had not read the statement she signed before the Assistant United States Attorney. (Tr. 311).

On cross-examination Hernandez denied that Torres had ever described her as his right hand man. She also testified that she never saw a scale, white powder or a cigar box filled with plastic bags in their living room in early April of 1977. (Tr. 334). This testimony directly contradicted the testimony of undercover agent Guzman.



**POINT I****The District Court's Answer to the Jury's Final Note Was Responsive, and Accurate.**

Hernandez contends that Judge Gagliardi committed reversible error in rereading his conspiracy charge to the jury in response to the jury's note. This argument should be rejected because the District Court's response to the jury's inquiry was responsive to the note, legally accurate, and fair to the defendant.

During the second day of jury deliberations, the jury wrote the following note:

"If a person, one, possesses knowledge of the facts of the conspiracy or, two, possesses precise knowledge of the participants of a conspiracy, or, three, resides in the midst of a criminal operation with or without telling anyone about it, does either of these categories constitute conspiracy under the law?" (Tr. 580).

After reading the note in open Court, Judge Gagliardi stated that the proper way to respond to this note was to reread the conspiracy charge. Hernandez argued that the District Court should respond to the note by simply saying "no". Judge Gagliardi determined that he was "obliged" to answer the note by rereading the conspiracy charge. (Tr. 5808). Thereafter, the District Court proceeded to reread the conspiracy charge—a charge which was accurate in every respect, and which Hernandez acknowledges was an accurate statement of the law. (Br. 24).\*

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\* During the jury's deliberations 14 notes were considered by the District Court. In response to the various questions by the jury, the District Court never gave a yes or no answer despite requests to do so by both counsel for the Government and Hernandez. (Tr. 509, 539, 556, 579). Indeed in response to an earlier note, Judge Gagliardi informed counsel that he did not

[Footnote continued on following page]

The substance and extent of supplemental jury instructions are matters within the sound discretion of the District Court. *United States v. Gentile*, 525 F.2d 252, 260-61 (2d Cir. 1975), *cert. denied*, 425 U.S. 903 (1976); *United States v. McCarthy*, 473 F.2d 300, 307-08 (2d Cir. 1972). See also *United States v. Hayes*, 553 F.2d 824, 829 (2d Cir. 1977), *cert. denied*, 98 S. Ct. 204 (1978); *United States v. Price*, 447 F.2d 23 (2d Cir., *cert. denied*, 404 U.S. 912 (1971)). Since Judge Gagliardi's supplemental instruction was a reiteration of his conspiracy charge, which was legally accurate and responsive to the note, there could be no error as Hernandez argues in his refusal to respond to the jury's note by simply stating "no." \*

The defendant futilely attempts to convey the impression that the District Court's rereading of the conspiracy charge was not responsive to the jury's note. The note indicated confusion among the jury as to the basic definition of conspiracy. The note clearly indicated a need for reinstruction on the definition of conspiracy. The District Court's response set out the elements which the jury was required to find including a lengthy discussion of the type and nature of participation required before the jury could convict Hernandez. Hernandez asserts that the District Court never explained "what conduct constituted participation" and acknowledges only one brief phrase from the supplemental instruction deal-

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like to respond with a simple yes or no to a jury's note. (Tr. 556). Instead, the District Court gave a more detailed answer and then asked the jury if they understood or if they had any further questions.

\* If Judge Gagliardi's instruction had not been responsive the jury could have readily informed the Court. After rereading the conspiracy charge the District Judge twice asked if the instruction responded to the jury's question. The jury nodded affirmatively, and did not send out any additional notes before returning the guilty verdicts. (Tr. 588). It bears emphasis that this was hardly a timid jury—they had written fourteen notes, and had spoken out in open Court during deliberations. (Tr. 522, 544).

ing with the subject. (Def. Br. 23). In fact, the District Court's supplemental instruction went on for approximately two pages on the very issue relating to the knowledge and participation needed in order to find a defendant guilty of conspiracy. (Tr. 585-87). Among other things the District Court said:

" . . . In determining whether a defendant became a member of the conspiracy, you must determine not only whether that person participated in it, but whether that person did so with knowledge of its unlawful purpose. . . . However, mere association with one or more of the conspirators does not make one a member of the conspiracy, nor is knowledge without participation sufficient. What is necessary is that the defendant participate with knowledge of at least some of the purposes of the conspiracy and with the intent to aid in the accomplishment of those unlawful ends." (Tr. 586).

Thus a reading of Judge Gagliardi's conspiracy charge demonstrates that the Court clearly set out the legal prerequisites for a finding of participation in a conspiracy. The charge did precisely what the defendant wanted—to explain to the jury the legal requirements of intent and knowledge. The charge expressly cautioned the jury that neither mere association with a co-conspirator nor mere knowledge of unlawful activity without participation was sufficient to find Hernandez guilty. *United States v. DiStefano*, 555 F.2d 1094, 1103 (2d Cir. 1977). That instruction precisely, fully, and fairly responded to the jury's note.

Defendant's reliance on *United States v. Guilette*, 547 F.2d 743, 750-51 (2d Cir. 1976), *cert. denied*, 98 S. Ct. 132 (1978) is startling. In *Guilette* this Court held that the trial court's supplemental instructions adequately informed the jury that a defendant cannot be found to have joined a conspiracy unless the jury found that the defendant affirmatively joined the con-



spiracy and promoted its objectives. In the instant case Judge Gagliardi's rereading of his conspiracy charge *expressly* informed the jury that Hernandez could not be convicted unless the jury found that she had joined the conspiracy with knowledge of its unlawful purpose, that she knowingly participated in the conspiracy, and that mere association with co-conspirators or mere knowledge without participation was insufficient. (Tr. 585-86). Judge Gagliardi's supplemental instructions on this point were as beneficial to the defendant as that approved by this Court in *United States v. Guilette*, *supra*, 547 F.2d at 750, n.5. See also *United States v. Guanti*, 421 F.2d 792, 801 (2d Cir.), *cert. denied*, 400 U.S. 832 (1970), where the jury requested a defense summation and instead the District Court gave a restatement of the elements of conspiracy as to all defendants.\*

Finally, while the defendant never claims that the conviction should be reversed because the verdict was coerced, portions of the brief speculate as to the mental processes of the jurors, and intimate that somehow jurors were pressured into a guilty verdict. A review of the District Court's response to each note plainly demonstrates that the jury was not coerced into a unanimous verdict.\*\* See *United States v. Robinson*, 560 F.2d 507,

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\* Hernandez' reliance on *United States v. Bolden*, 514 F.2d 1301 (D.C. Cir. 1975) is misplaced. In *Bolden* the Court's original charge did not provide guidance on a difficult legal issue related to the felony order rule. After the jury focused on the issue the court's supplemental charge also failed to address the problem. In contrast the Hernandez jury was correctly instructed both initially and in the supplemental instruction.

\*\* To describe the jurors as exhausted and to compare the Court's charge to the 13 hour charge and 4 hour supplementary charge in *United States v. Persico*, 349 F.2d 6, 8 (2d Cir. 1965) is a distortion of what actually transpired. (Def. Br. 24). The District Court's original instructions were brief and the supplementary charge to which Hernandez objects took less than 12 minutes.

517 (2d Cir. 1977) (*en banc*), *cert. denied*, 46 U.S.L.W. (March, 1978); *United States v. Rodriguez*, 545 F.2d 829, 832 (2d Cir. 1976), *cert. denied*, 46 U.S.L.W. 3215 (October 4, 1977). Defendant's efforts to look behind the notes is pure speculation, and of no legal significance. What is significant is that an obviously careful and correctly instructed jury after lengthy deliberations found that Hernandez was a knowing member of a conspiracy to distribute narcotics.

## POINT II

### **The District Court Properly Denied Hernandez' Suppression Motion.**

Hernandez claims that the District Court erred in refusing to hear her suppression motion made for the first time on the day set for trial. She argues that the District Court then improperly prohibited her from effectively presenting the motion during trial. The motion claimed that her post arrest statements should be suppressed because the Government lacked probable cause to arrest her. While Judge Gagliardi ruled properly that the motion had been filed untimely, he still heard evidence during the trial which allowed him to rule correctly that probable cause existed to arrest Hernandez.

The District Court at a pretrial conference on July 27, 1977 set down a strict timetable for all defense motions. Without any objection from Hernandez' counsel, Judge Gagliardi established August 10, 1977 as the last day for defense motions. On August 18, 1977 Hernandez made a motion to suppress post arrest statements based on a failure to advise her of her *Miranda* rights at the time of arrest. Defense counsel submitted his own affidavit along with an unsigned affidavit of Hernandez.

The trial was scheduled to commence on August 22, 1977. Judge Gagliardi intended to begin the trial on



that day immediately after the suppression hearing. On the morning of August 22 Hernandez for the first time moved to include an additional purpose for the suppression hearing—whether post arrest statements should be suppressed because she had been arrested without probable cause. The District Court informed defense counsel that,

“This is the first time that has been brought forward. The time for including motions has long since expired. It may long since have expired with respect to the motion to suppress, which I will hear.” (Supp. Tr. 11).

Without any further objection by defense counsel the suppression hearing began on the claim that the defendant had not been advised adequately of her *Miranda* warnings. Detective Ronald Stanley testified that he had arrested Hernandez and read to her the *Miranda* warnings from a form used for that purpose. (Supp. Tr. 18). Stanley also testified about the defendant's interview by an Assistant United States Attorney where she once again was given her *Miranda* warnings. (Supp. Tr. 26). Hernandez testified at the suppression hearing claiming that the agent had not read to her any rights from a card, and that she had not made any admissions until she had been questioned for four hours. (Supp. Tr. 98).\*

The District Court denied Hernandez' motion. (Supp. Tr. 121). Upon the denial of the motion defense counsel stated that at the close of the Government's case during the trial he would move to suppress the defendant's post arrest statements on the grounds that there was no probable cause to arrest the defendant.

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\* On cross-examination Hernandez stated that at her arrest she had been told her statements could be used against her though she denied making some of the statements attributed to her by Detective Stanley. (Supp. Tr. 118).



Shortly after the suppression hearing had ended and defense counsel had stated that he would move to suppress during the trial for failure to establish probable cause to justify the arrest, Judge Gagliardi observed properly that the Government need not establish probable cause for the arrest as part of its proof at trial. Defense counsel reiterated his view that he could still make his suppression argument during trial. (Tr. 143-44). The argument concluded with the following colloquy:

THE COURT: I don't know what else they may have. They may have a lot more than they will prove here.

MR. THAU: We will see.

THE COURT: We will see, and they may have it.

MR. THAU: I understand that, they may have it or may not have it.

(Supp. Tr. 143-44).

After the testimony of the first Government witness Hernandez renewed her suppression motion based on lack of probable cause to arrest. The District Court found probable cause and denied the motion, informing counsel that if he desired a post trial motion could be made. (Tr. 166-67). No post trial motion was made.

Once again, at the close of the Government's case Hernandez moved to suppress her post arrest statements claiming a lack of probable cause. Hernandez' argument was based on the alleged inconsistencies between the claim in the complaint filed at the time of her arraignment and the trial testimony. The District Court again heard argument (Tr. 261-265) and denied the motion in the following language:

"... I think on the basis of the testimony in here, her presence in the apartment, and knowledge of

all of that, that there was reasonable grounds. You are arguing that they didn't have reasonable grounds to make the arrest. . . .

In connection with the arrest and so forth, there is no question in my mind that there was probable cause to make this arrest." (Tr. 263-264).

While Judge Gagliardi properly ruled that the suppression motion had not been filed timely, it is clear that the District Judge followed defense counsel's suggestion and considered the suppression issue during the trial. After hearing the testimony of certain undercover agents Judge Gagliardi ruled:

". . . there is no question in my mind but there was probable cause to make the arrest . . ." (Tr. 264).

Viewing the evidence in the light most favorable to the Government, *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977), the District Judge was compelled to conclude that the testimony heard during the trial showed that the agents had probable cause to arrest the defendant on the date she in fact was arrested. See *United States v. Friedman*, 558 F.2d 1125 (2d Cir. 1974), *cert. denied*, 421 U.S. 1001 (1975).

During the trial the District Court had heard the evidence from undercover agent Guzman concerning the sale of heroin on April 7, 1977. Guzman testified that Hernandez was present in the room for part of the time while he was purchasing the heroin. Guzman further testified that in the room with Hernandez was a table with a pile of white powder, a strainer, a scale, and plastic bags. Guzman and undercover agent Mercado testified that on May 24, 1977 Hernandez was present in the apartment when they received a sample of heroin. During that deal Hernandez told the undercover agents that she knew everything that was going on, that they had nothing to



worry about, and that if asked she would say that they were there to collect insurance. At that point co-defendant Torres told Guzman and Mercado in Hernandez' presence that Hernandez was his "right hand man." (Tr. 109). Hernandez' counsel was able to cross-examine Guzman and Mercado without objection. Based on their testimony Judge Gagliardi was justified in finding that probable cause existed to arrest Hernandez.\* Moreover, during the trial the District Judge obviously did not preclude Hernandez from advancing her claim that her post arrest statements should be suppressed for lack of probable cause to justify the arrest.

Hernandez seeks to create doubt on the issue of whether probable cause existed to justify her arrest by scrutinizing the complaint filed at the time of her arraignment after the arrest and signed by Detective Joseph Scamardella. (Br. 31-32). This argument simply ignores the evidence Judge Gagliardi heard during the trial from undercover agents Guzman and Mercado who had purchased the heroin from Hernandez and her co-conspirators—testimony which by itself was sufficient to establish probable cause. Even if the Scamardella complaint was defective, the arrest is nonetheless lawful because it was supported by probable cause independent of the warrant. *United States ex rel. LaBelle v. LaVallee*, 517 F.2d 750, 753 (2d Cir. 1975), *cert. denied*, 423 U.S. 1062 (1976).

Moreover, Hernandez concedes that Scamardella's complaint was adequate to establish probable cause. (Br. 32). She claims, however, that "the truthfulness of these facts

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\* In determining whether probable cause existed for the arrest the District Court should look to the collective knowledge of the agents and not simply the knowledge of the arresting officer alone. *United States ex rel. LaBelle v. LaVallee*, 517 F.2d 750, 753 (2d Cir. 1975), *cert. denied*, 423 U.S. 1062 (1976); *United States v. Canieso*, 472 F.2d 1224, 1230 n. 7 (2d Cir. 1972).



is open to serious question." (Br. 32). This claim is inaccurate. The complaint stated that Scamardella had been told by police officers that on April 7, 1977 undercover agents had purchased 58.6 grams of heroin from Torres, DeJesus, Hernandez, and two other individuals. This paragraph of the complaint and paragraph three of the complaint are consistent with the testimony of undercover agent Guzman at the trial. The additional claim of perjury revolves around Guzman's testimony that he had purchased one ounce of heroin on April 7 while the complaint states that 58.6 grams—approximately two ounces—were purchased. An examination of the chemist's report provided to Hernandez' counsel during pre-trial discovery shows that the 58.6 grams was the gross weight and the 30 grams was the net weight; the net weight was used in the indictment. Thus, Hernandez' intimations that the Scamardella affidavit based on hearsay statements from the chemist's report and undercover agent Guzman was perjurious are inaccurate.

Finally, Judge Gagliardi would have been justified in refusing to rule on the tardy suppression motion. Rule 12(f), Fed. R. Crim. P., provides that a defense or objection is waived if not made at the time set by the court for the making of the pretrial motion. In the instant case Hernandez made a motion to suppress post arrest statements on the ground that she was not given her *Miranda* warnings. On the day of trial Hernandez attempted to piggyback a new motion to suppress onto the motion to suppress which was being heard on the eve of trial. Though both motions were to suppress her post arrest statements, the new one was based on lack of probable cause to arrest and thus would have required different witnesses and proof from that required for the scheduled hearing. To have heard the new motion as part of a pretrial suppression hearing might have necessitated a delay in the trial to allow the Government to get the agents who could establish probable cause. This may have

disrupted the court's schedule and the schedule of other defense counsel in this multi-defendant case. *United States v. Mauro*, 507 F.2d 802 (2d Cir. 1974), *cert. denied*, 420 U.S. 99 (1975); *United States v. Bennett*, 409 F.2d 888, 901, (2d Cir. 1969), *cert. denied*, 396 U.S. 852 (1970).

Hernandez' effort to demonstrate good cause for the tardy filing is unconvincing. It would appear from the record that the new motion was made orally by defense counsel almost as an afterthought inasmuch as the papers for the other motion had been prepared shortly before trial was to begin; the information on which the motion was based had been in her possession for weeks prior to trial; and Hernandez had offered no legitimate excuse for the delay.\* The argument that Hernandez' motion was late because she was being considered for deferred prosecution is certainly not relevant since the other suppression motion based on failure to give *Miranda* warnings was filed prior to the first day of trial and in any event cannot justify failure to file a motion in accordance with the motion schedule established by the District Court.\*\* Furthermore, the claim that Hernandez did not receive the waiver of rights form until shortly before trial does not justify the tardy filing of a suppression motion based on lack of probable cause to arrest. If such a document was relevant it would be pertinent to the question of whether *Miranda* warnings were given, and a motion based on the failure

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\* It may be significant as to the importance Hernandez attached to her claim that she made no post trial suppression motion though the District Court specifically had invited one. (Tr. 167).

\*\* This Court has supported the District Court's efforts to require pre-trial motions to be filed timely. *United States v. Mauro*, *supra*; *United States v. Yanagita*, 552 F.2d 940, 943 (2d Cir. 1977); *United States v. Tortorello*, 480 F.2d 764, 785, n. 18 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973).



to give such warnings was filed before the first day of trial. Hernandez' motion based on lack of probable cause was based on allegations in the complaint and as such were well known to her weeks before the motion was due. Thus, in the circumstances of this case there can be no valid claim of surprise compelling the District Court to entertain a motion not filed timely. *United States v. Blackwood*, 456 F.2d 526, 529 (2d Cir.), *cert. denied*, 409 U.S. 863 (1972).\*

### CONCLUSION

**The judgment of conviction should be affirmed.**

Respectfully submitted,

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\* Indeed it is far from clear that Hernandez' counsel had insisted on a full pretrial hearing. He appeared satisfied with simply making his motion during the trial. Counsel for Hernandez said that he would press his claim at the close of the Government's case and would develop his evidence solely through the witnesses offered by the Government. The District Court questioned whether this would be possible but counsel persisted. (Supp. Tr. 122, 143-44). After the Government's first witness and again at the close of the Government's case, Hernandez raised the motion anew based solely on the testimony and the information in the complaint. Hernandez had abandoned any claim for a full hearing and was going ahead with the motion based on evidence developed through the Government's case at trial.





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